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FOR YOUR INFORMATION
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STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHIC'S COMMITTEE

OPINION NO. 93-12

July 13, 1993

The Ethic's Committee received a request for an opinion from [REDACTED] The facts set forth in the letter and the various attachments are as follows:

Law Firm A was sued. Law Firm B represented one of the former partners (X) of Law Firm A in that suit. X left Law Firm A before the case was brought.

While in the employ of Law Firm A, X did work on a file including arguing a motion for summary judgment and an appeal. When X handled the appeal, only one of two judgments was appealed from and the North Dakota Supreme Court concluded that it did not have jurisdiction. Thereafter the client sued X and Law Firm A.

Law Firm A and X were both represented by one attorney at the commencement of the action. At some point, a dispute arose between the firm and X and Law Firm B was retained to represent X. Trial was had on the matter and final arguments have been submitted in writing. The court had not ruled on the case when the request for opinion was made.

During the defense of the case, the attorney from Law Firm B representing X did visit with members of Law Firm A and looked at the file without a subpoena. However, the firm required their attorney be present when the file was reviewed with one exception. The defense of the case was joint and cooperative with neither the firm nor X pointing fingers at one another.

The question of conflict of interest arises because Law Firm B has now been retained to bring an action against Law Firm A on an entirely separate matter. X is gone from the firm and is not a defendant in the new matter.

The general rule governing conflicts of interest is set forth in Rule 1.7 of the North Dakota Rules of Professional Conduct. Rule 1.7 provides that:

(a) A lawyer shall not represent a client if the lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests.

(b) A lawyer shall not represent a client when the lawyer's own interests are likely to adversely affect the representation.

(c) A lawyer shall not represent a client if the representation of that client might be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(d) Except as required or permitted by Rule 1.6, a lawyer shall not use information relating to representation of a client to the disadvantage of a client unless a client who would be disadvantaged consents after consultation.

(e) As used in Rules 1.7 through 1.12, the term "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party.

In determining whether a conflict exists, it has been stated that:

[T]he test of "inconsistency" is not whether the attorney has ever appeared for the party against whom he now proposes to appear, but it is whether his accepting the new retainer will require him, in forwarding the interests of his new client, to do anything which will injuriously affect his former client in any matter in which he formerly represented him. . . .

The issue, then, is whether Law Firm B will have to do anything which will injuriously affect its former client. X is its former client, not Law Firm A.

Law Firm A was not a client of Law Firm B in the prior litigation. Joint representation in defense of a lawsuit does not establish an attorney-client relationship.

There is nothing in Rule 1.7 which would preclude Law Firm B from now representing a separate client in an action against Law Firm A as long as X is not a defendant and as long as no information obtained from X relates to the second lawsuit. Law Firm B would be precluded from representing the new client only if that representation might be adversely affected by the lawyer's responsibilities to Law Firm A, and, under the facts described above, Law Firm B has no responsibilities to Law Firm A.

Rule 1.9 deals with a former client. Since the issue in this case is whether Law Firm A was ever a client, Rule 1.9 would not apply.

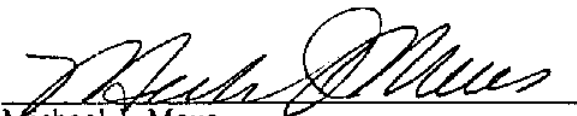
CONCLUSION

The committee is of the opinion that the proposed representation of the new client in a separate action against Law Firm A does not violate the rules of professional conduct.

This opinion is provided pursuant to Rule 1.2(b), North Dakota Rules for Lawyer Disability and Discipline. This Rule states:

A lawyer who acts in good faith and with reasonable reliance on a written opinion of advisory letter of the Ethic's Committee of the State Bar Association of North Dakota shall not be subject for sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct which is the subject of the opinion or advisory letter.

This opinion was drafted by Michael J. Maus and was unanimously approved by the Ethic's Committee on July 13, 1993.



Michael J. Maus
Chairperson

[REDACTED]

June 9, 1993

The Honorable Lee Christofferson
Judge of District Court
PO Box 854
Devils Lake, ND 58301-0854

Re: [REDACTED]

Dear Judge Christofferson:

Your name was referred to me by Connie at the North Dakota Supreme Court to obtain an opinion concerning the issue as to whether or not I and the law firm that I am associated with have a conflict in pursuing a claim on behalf of our client the [REDACTED] [REDACTED] and [REDACTED] against [REDACTED]

I am enclosing with this letter the following information:

1. Photocopy of a letter written to [REDACTED] by myself dated May 5, 1993.
2. Photocopy of complaint drafted by [REDACTED] of the law firm of [REDACTED]
3. Copy of a memorandum prepared by [REDACTED] of our office to me dated June 9, 1993.

In response to my letter of the 5th, [REDACTED] has indicated, because of [REDACTED]'s involvement in the other case, a conflict exists on our part.

The reason that the complaint was not drafted by our law firm is that the [REDACTED] firm decided not to commence a fraud action against a local attorney in Grand Forks.

I have conferred with all of my partners and it is our belief that, based upon the facts presented, absolutely no conflict exists on our part to handle this matter for the [REDACTED] [REDACTED]

The Honorable Lee Christofferson
June 9, 1993
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Rather than have this issue once again raise itself later, it has been my decision to raise the issue with you in your capacity as one who can give such opinions to ask for your opinion.

Should any of the information requested herein raise other questions or require additional information, we will be most happy to supply same.

I would hope to hear from you within the near future.

Respectfully yours,



Enclosures

[REDACTED]

May 14, 1993

[REDACTED]

Re: [REDACTED]

Dear [REDACTED]

I have reviewed your letter of 5/5/93 with [REDACTED]. [REDACTED] is very concerned that a conflict of interest exists in this case because [REDACTED] is representing [REDACTED], formerly of our office, in a lawsuit brought against [REDACTED] all the attorneys in our office, and our law firm. [REDACTED] has not only been in our office reviewing files, but is also working closely with [REDACTED] who is representing the rest of the firm.

[REDACTED] requests that you immediately withdraw from this matter as it appears there would be a conflict of interest if you take a position opposed to, and in conflict with, a member of this law firm.

Sincerely,

[REDACTED]

M E M O R A N D U M

TO: [REDACTED]
 FROM: [REDACTED]
 DATE: June 9, 1993
 RE: [REDACTED]

Post-it brand fax transmittal memo 7671		# of pages = 2
To [REDACTED]	From [REDACTED]	
Co. [REDACTED]	Co. [REDACTED]	
Dept. [REDACTED]	Phone # [REDACTED]	
Fax # [REDACTED]	Fax # [REDACTED]	

We were retained to represent [REDACTED] in an action commenced against her; her former employer, the [REDACTED] and each of the partners of that firm individually. I don't recall the exact date that she was terminated by the law firm, but I do know for sure that it was before we became involved in the case.

The action against [REDACTED] and the firm arose out of their representation of [REDACTED] in an action against [REDACTED] and the [REDACTED]. Judge Smith granted summary judgment for [REDACTED] and [REDACTED] asked that the judgment be appealed. Although a former associate by the name of [REDACTED] signed the complaint and did extensive work on the file, [REDACTED] handled the summary judgment arguments and the appeal after [REDACTED] left the firm. She failed to perfect the appeal by appealing from only one of two judgments that were entered on different dates by Judge Smith. The North Dakota Supreme Court concluded that it did not have jurisdiction and dismissed the appeal.

[REDACTED] sued [REDACTED], the [REDACTED] law firm, and each of the partners in the firm individually. Though [REDACTED] was no longer employed with the firm, [REDACTED] retained [REDACTED] to represent all of the defendants, having determined the interest of all were joint. At some point a dispute arose between the firm and [REDACTED] over some fees on another file, having nothing to do with the [REDACTED] action. Because of that dispute [REDACTED] became uncomfortable with the dual representation of [REDACTED] and asked the [REDACTED] for separate counsel. [REDACTED] retained our firm to represent [REDACTED]. The case was assigned to me and I represented [REDACTED] in preparing for the trial and during the trial to Judge Jahnke in Grand Forks beginning on May 4, 1993. At the close of evidence the court requested written final arguments. All parties submitted final arguments on June 1, 1993. The Judge has not yet ruled. Based on his comments from the bench I expect to receive a written memorandum opinion around July 1, 1993.

During the defense of the case I did visit with the members of the firm and look at the law firm file in the underlying action without subpoena. The firm, however, required [REDACTED] to be present during times when I looked at the file or when I visited

with [REDACTED] about the case, with one exception. At one point I had [REDACTED] with me and wanted to look at the file. I was told that we could not look at the file without [REDACTED] presence. I told them we were in a real hurry and that we needed a document that would of course be as helpful to their defense as to the defense of [REDACTED]. I was told that I could go look at the file as long as [REDACTED] did not. I did at that time look at the file without [REDACTED] being present.

Our defense was joint and was cooperative. We had no reason to point the finger at the firm and did not. Likewise, they did not point the finger at [REDACTED]. Although we cooperated closely and well, there was never any question that [REDACTED] was my client and that I did not represent the law firm.

Let me know if you need anything further from me.

[REDACTED]

May 5, 1993

[REDACTED]

[REDACTED]

Re: [REDACTED]

Dear [REDACTED]

The undersigned has been referred the matter involving [REDACTED] and [REDACTED] and derivatively, because of the transfers made to [REDACTED], in which a claim is asserted against those individuals by the [REDACTED]. As you are aware, considerable investigation concerning the facts involved in this situation has been undertaken by [REDACTED] of the firm of [REDACTED]. I have independently reviewed the file and concur with the investigation.

The file reveals that [REDACTED] in concert with [REDACTED] in a civil case in Grand Forks County, North Dakota (file no. 85-804) entitled [REDACTED]

[REDACTED] did the following:

- i) Prepared separate answers in Civil Case No. 85804 for Defendants [REDACTED] and [REDACTED] at the direction of [REDACTED] on or about May 20, 1985, each of which separate answers provided that [REDACTED] would indemnify [REDACTED] from any Judgment or costs in Civil Case No. 85804.
- ii) Communicated to [REDACTED] on or about May 28, 1985, that [REDACTED] was and would be indemnified by [REDACTED] for any judgment, costs or attorney's fees arising out of Civil Case No. 85804, and his representation of them therein.
- iii) Represented both [REDACTED] and [REDACTED] in Civil Action No. 85804, parties with conflicting or adverse interests, to the detriment of [REDACTED]

- iv) Failed to protect the indemnity owed and granted to [REDACTED] by [REDACTED] for any judgment or costs imposed on or against [REDACTED] in Civil Case No. 85804.
- v) Failed to represent and defend the interests of [REDACTED] in Civil Case No. 85804.
- vi) Was involved in or aware of, the sale of [REDACTED] assets on December 31, 1987, which sale was an attempt by [REDACTED] and [REDACTED] to defraud, hinder or delay those due obligations from [REDACTED] in that the agreement provided that all payments due under the agreement be made payable to [REDACTED]
- vii) Entered into a Stipulation for Judgment against [REDACTED] on or about May 9, 1989, without authorization from, or consultation with [REDACTED] and failed to subsequently notify [REDACTED] of the Stipulation.
- viii) Failed to reveal in the petition to the Bankruptcy Court, In re Bankruptcy of [REDACTED], Case No. 89-05380-WAH, filed May 16, 1989, the involvement of [REDACTED] with [REDACTED] and/or the sale of the assets of [REDACTED]
- ix) Allowed [REDACTED] corporate charter to be involuntarily terminated by the North Dakota Secretary of State on or about August 1, 1989.
- x) Failed to communicate or forward to [REDACTED] the Notice of Entry of Judgment, mailed on November 26, 1990, to [REDACTED] as the attorney for [REDACTED] in Civil Case No. 85804.
- xi) On or about April 13, 1992, failed to communicate or forward to [REDACTED] the demand for payment of the judgment rendered in Civil Case No. 85804, which demand was made by letter from Attorney [REDACTED] on behalf of the [REDACTED], the receiver for [REDACTED] to [REDACTED] delaying [REDACTED] discovery of the judgment against it.

These claims against [REDACTED] involve intentional acts and, if an action is brought, based upon NDCC 12.1-06.1, the damages may be trebled. Additionally, a claim for attorneys fees will be had.

[REDACTED]
May 5, 1993
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In reviewing the correspondence, the assertion is made that somehow something should have been done pursuant to Rule 60(b) of the Rules of Civil Procedure. Since judgment was entered against [REDACTED] a number of years ago and assuming the facts to be as stated, what claim for relief could be had under Rule 60(b)?

The file is replete with requests to see the file. Since an alleged joint defense was interposed with [REDACTED], we should be entitled to see all files relating to defense of actions brought on behalf of [REDACTED]. If you accede to this request, we would be happy to inspect the files and/or presuming that the files are not too voluminous arrange for photocopying of same. Please contact my office to that effect.

If there are specific documents etc. which would refute the allegations contained, we are most interested in seeing same.

If a desire for a settlement exists, we would be pleased to entertain an offer. The face amount of the claim is \$32,639.89 together with interest since the date the [REDACTED] paid off the judgment.

If you have any other questions we would be most happy to answer them.

I will be gone between the 7th of May and the 30th of May and would hope to have a response to this letter by the time I return to my office.

Very truly yours,

[REDACTED]

[REDACTED]